

## **SPECIAL LECTURE NO. 17**

### **MAKING OF A CYBER LAW IN NEPAL: A CASE OF ELECTRONIC TRANSACTIONS ACT, 2006**

Harsha Man Maharjan



सुखानो मनः सुमितिः सुमती

**Centre for Himalayan Studies  
UNIVERSITY OF NORTH BENGAL**

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## Foreword

It is encouraging to learn that the special lecture entitled **‘Making of a Cyber Law in Nepal: A Case of Electronic Transactions Act, 2006’** was delivered by Dr Harsha Man Maharjan at the Centre for Himalayan Studies, University of North Bengal, who is a postdoctoral scholar at the Institute for Advanced Study in the Global South, Northwestern University, Qatar and, a former senior researcher at Martin Chautari, a prominent research institute in Kathmandu, Nepal, is going to be a part of ‘Special Lecture Series’ brought out as one of the publications of the Centre for Himalayan Studies.

The lecture deals with the background of the Electronic Transactions Act, 2006 highlighting the international and national contexts which created the atmosphere to prepare this Act. It also discusses the policy processes of law-making, highlighting policy actors’ actions in Nepal. The author has critically analysed how the misuse/ abuse of the act has been witnessing widespread protests by journalists, human rights activists and even by the police administration owing to its inherent complexities causing controversies in present-day Nepal. Consequently, there have been demands by different stakeholders to bring out appropriate modifications to the Act or to bring out new enactments in this regard while the initiatives taken by the concerned authority in this context have not been fruitful to date.

During his lecture session, the author discussed several relevant issues on the cyber law in Nepal. It is well expected that this publication will be academically helpful to the researchers working on cyber (security) related issues, particularly in Nepal.

I take this opportunity to congratulate the author for this publication and I am happy to present this Special Lecture No. 17 for wider readership.

Prof. Ujjwal Bhui  
Director  
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# MAKING OF A CYBER LAW IN NEPAL: A CASE OF ELECTRONIC TRANSACTIONS ACT, 2006

Harsha Man Maharjan

## Introduction

Amidst the misuse of the Electronic Transactions Act, 2006 which was enacted on December 8, 2006, Nepal has been witnessing widespread protests.<sup>1</sup> The contentious issue revolves around Article 47 of the Act, which is seen as violating freedom of expression, and there are demands for its amendment from journalists (Rastriya Samachar Samiti 2076 v.s. [2019]) and human rights activists (Maharjan 2078 v.s. [2022]a). Additionally, the Nepal Police are also calling for timely changes to the existing law (Ratopati 2074 v.s. [2018]). As a result, the Ministry of Communications and Information Technology has taken the initiative to draft the Information Technology Bill, which was registered in the House of Representatives on February 14, 2019. In the subsequent month, the Parliament engaged in a comprehensive and clause-by-clause discussion on the Bill.<sup>2</sup> However, due to the stringent provisions outlined in the draft legislation, it faced opposition from within the Parliament and from civil society, including journalists and human rights activists who expressed their dissent through protests. Consequently, the bill is still under consideration in the Parliament, given the recent political instability and parliamentary stalemate in 2021 (Maharjan 2021).

Though this law is very controversial, no attempt has been made to understand the policy process of this Act. Scholars (Ray 2022; Malla and Timilsena 2022) have mainly focused on the implementation of this law. Some (Blythe 2008) have even evaluated the provisions of the law. Even a government committee has suggested to revise this law as the provisions of Article 47 are vague, contradictory, and confusing (Mahanayadhibaktako Karyalaya 2074 v.s. [2017]). As the study of the policy process of this law is lacking, we don't know exactly in which political contexts this law was formulated and why the provisions which are in the laws are there. Neither do we know whose interests this law serves.

In this context, this paper aims to fill this gap. It discusses the making process of the Electronic Transactions Act. I seek to uncover how policy rules were formulated and who were the key stakeholders involved in the decision-making process. Such an analysis will shed light on the various debates that occurred during the policy/Act-making process, the issues addressed, any outstanding matters left unresolved, and the provisions incorporated at that stage.

The Electronic Transactions Act has been a topic of considerable controversy since its introduction. This research aims to shed light on the origins of the Act, the organizations involved in its development, and the influence that their participation had on the provisions of the Act. Notably, the law was primarily shaped by the interests and concerns of individuals and organizations operating in the field of information technology. However, it is important to highlight that public input was periodically sought, suggesting a more inclusive approach to policy-making. Yet, in this paper, I argue that the participation of the actor from the information technology sector shaped the trajectory of the law as well as its main content.

I have examined the involvement of various organizations from the time the need for the Act arose in 2000 to its passage in the Parliament in 2006 and subsequent publication in the Nepal Gazette. To gather relevant information, news clippings from newspapers and magazines during that period were reviewed, which had been compiled by journalist and researcher Vinaya Kumar Kasajoo.<sup>3</sup> Additionally, I analyzed issues of the *Nepal Gazette* available on the website of the Department of Printing. I also checked the materials on the old website of the Computer Association of Nepal (CAN), the Ministry of Science and Technology, and the National Planning Commission to get more information about the policy process. To gather information related to the context and politics of the policy process, I also conducted interviews with CAN representatives involved in the drafting process, officials from the Ministry of Science and Technology, lawyers, and journalists who had reported on the Act. I have also analyzed the verbatim of the parliament when this Act was passed in 2006.

This qualitative research has certain limitations. One key limitation is the poor institutional memory in Nepal, which resulted in the study being unable to capture all the activities that occurred during the drafting of the Electronic Transactions Act in 2000. Some incidents could not be accurately dated as I did not have access to old documents at CAN. In the absence of such documents, I took interviews with individuals involved in the law-making process. However, due to the reliance on older memories, some aspects could not be explored in great depth. Consequently, this research heavily relied on news articles and publications from newspapers as the primary sources of information. Additionally, it is important to note that during the time of enacting this law, the information technology sector was relatively new in Nepal, resulting in limited media coverage and few journalists reporting on the subject matter.<sup>4</sup> Furthermore, the draft versions of the law made public periodically included only the years, making it difficult to determine the exact dates when those drafts were released.

The remaining part of this paper mainly has two sections. The upcoming section presents the background of this Act highlighting the international

and national contexts which created the atmosphere to prepare this Act. It is followed by the second discussing the policy process of the law highlighting the actions of policy actors.

### **Environment of Policy Making Process**

The policy-making environment is influenced by both international and national factors, which play a significant role in the enactment of e-commerce legislation. In particular, the growing utilization of electronic media in international trade during the mid-1990s captured the attention of the United Nations, leading to an interest in regulating this emerging field. This coincided with the global rise of information technology, prompting the United Nations Commission on International Trade Law to establish a model law on e-commerce in 1996. The United Nations not only formulated this law for its purposes but also encouraged participating countries to consider the model law when developing new trade or business legislation or amending existing laws (United Nations Commission on International Trade Law 1999). India, as a neighboring country, implemented the Information Technology Act in the year 2000, drawing inspiration from the Model Law (Abhilash 2002; Basu and Jones 2003.). The enactment of this law in India had a notable impact on Nepal, influencing the discourse surrounding e-commerce legislation in the country.

The need for the Electronic Transactions Act in Nepal originated from the Information Technology Policy, which initiated the debate on the need to enact such an Act in Nepal in 2000. The government at that time established the National Information Technology Development Working Committee in 1999 to develop this policy. In September 1999, the committee held its inaugural meeting and formed the Information Technology Sub-Committee. This sub-committee invited experts and professionals from the field of education, specifically in information technology, for discussions and deliberations.

During these discussions, the participants recognized the necessity of formulating a vision and strategy paper on information technology. Consequently, six strategy papers were prepared, focusing on three key areas: universal access to information technology, education and training, and information technology in trade and government. One of these strategy papers specifically addressed the subject of e-commerce, recognizing its significance and the need for appropriate regulations in this domain (His Majesty's Government 2000).

The strategy paper, authored by information technology expert Manohar Bhattarai, highlights the significance of the electronic medium, particularly the Internet, in facilitating e-commerce, which is recognized as a pivotal component of the Internet economy. He writes:

Nepal must have a national e-commerce policy and strategy in place if it is to promote e-commerce and benefit from its development potential. Ideally, as in more traditional commerce, the private sector should provide the leadership for the growth and development of electronic commerce, including the establishment of realizable and trusted business practices for conducting commercial activities in the digital age (Bhattarai 2001: 142).

Within this strategy paper, it is emphasized that as Nepal prepares to become a member of the World Trade Organization, it is imperative to develop policies and strategies pertaining to the information economy and e-commerce. Furthermore, the paper emphasizes the need for specific e-commerce legislation in Nepal. It acknowledges that the absence of such laws leaves both traders and consumers feeling insecure when engaging in electronic transactions. As a result, the strategy paper recommends the formulation of laws to address these concerns. Additionally, the paper addresses key aspects related to e-commerce, including electronic payments, privacy, intellectual property, and security, recognizing their significance in fostering a robust and secure electronic marketplace.

Upon reviewing the six working papers, the sub-committee proceeded to draft the information technology policy. The draft, along with the strategy paper, underwent discussions involving representatives from the academic sector, private sector, and civil society. Taking into consideration the suggestions received during these consultations, the draft was then submitted to the National Information Technology Development Working Committee.

Subsequently, the National Information Technology Development Working Committee presented the draft to the Ministry of Science and Technology. Following the necessary deliberations and revisions, the policy was officially passed in October 2000 (His Majesty's Government 2000). Notably, one of the key strategies outlined in this policy was the legalization of e-commerce (Shree Panch Ko Sarkar 2057 v.s. [2000]). To fulfill this objective, the groundwork for creating legislation related to electronic transactions was initiated. In the coming section, I shall discuss the stages of making of this law.

### **Stages of Law Making**

Although the draft of the e-commerce law was initially prepared in 2000, it took a considerable amount of time to enact it as a law. It was finally enacted as an ordinance in 2004 and later passed by the parliament in 2006, officially becoming an act. Therefore, this section aims to provide insights into the process of law-making, divided into three sub-headings. The first sub-heading covers the period from 2000 to April 2001, during which efforts were made to pass the law. The second sub-heading focuses on the period from May 2001 to February 2006, when attempts were made to implement the law as



an ordinance, and it finally came into effect in August 2004. The third sub-heading examines the period from 2006 when the law was passed by the parliament and established as an official Act.

### **Homework on Drafting**

As per the prevailing law-making practice in Nepal, a bill follows a specific procedure before it can become law. The bill is initially presented in the parliament and requires majority approval from the legislature. Once passed by the parliament, it is then submitted to the head of state for their approval. After the head of state affirms the bill by applying a red seal, it is officially implemented as a law (Nepal Kanon Aayog 2066 v.s. [2009]).

In the 1990 constitution, the legislature was recognized as the primary entity responsible for law-making. Bills, with the exception of the Finance Bill, were introduced in either the House of Representatives or the National Assembly during their respective sessions. A bill passed by one assembly needed to be transmitted to the other for further consideration. In most cases, once the bill received majority approval from both houses, it was forwarded to His Majesty for final approval (His Majesty's Government 1990).

Prior to the introduction of the bill, it was necessary to draft the legislation itself. The responsibility of drafting the electronic transaction law fell upon the Ministry of Science and Technology. However, at that time, there were limited individuals with expertise in information technology. As a result, the Ministry sought assistance from the Computer Association of Nepal (CAN). CAN then took on the task of drafting this law, with the aid of legal expert Durga Bhurtel. According to Bhurtel, while preparing the drafts of this law, he consulted e-commerce laws in India and the United States. He collaborated with CAN officials and other IT experts to ensure the draft aligned with the specific needs and context of Nepal.<sup>5</sup> Rajib Subba, who served as CAN's secretary general from 2000 to 2002, recalls that the initial draft was prepared in English. Subsequently, the draft was submitted to the Ministry, which translated it into Nepali before further proceedings.<sup>6</sup>

During the process of translating the draft bill, it appears that it was named as the "Information Technology Act, 2057 v.s.," similar to the Information Technology Act, 2000, in India. News published in Nepali newspapers (Sedai 2057 v.s.[2000]; Nepal Samacharpatra 2057[2000]) indicated that the draft would soon be submitted to the Council of Ministers for review. Punya Prasad Neupane, the spokesperson for the Ministry of Science and Technology at the time, stated that if approved by the cabinet, the bill would be presented in the upcoming winter session of the parliament.

Additionally, the Ministry of Science and Technology actively sought suggestions from organizations and individuals in the field of information

technology during this period. The Computer Association of Nepal (CAN) specifically requested that the bill be renamed as Bidyutiya (Electronic) ra Digital Hastakshyar Sambandhi Bewastha Garna Baneko Bidheyak ( “Bill to regulate electronic transactions and digital signatures.” (Wagle 2058 v.s. [2001]) As a result, a revised version of the bill with the proposed title was made available on CAN’s website, providing stakeholders an opportunity to review and provide feedback on the proposed changes.

The draft of the Electronic Transactions Act in Nepal shares many similarities with India’s Information Technology Act (Government of India 2000). The preamble of the Nepali draft and the titles of paragraphs 1 to 8 align closely with the corresponding sections in Indian law. Moreover, the penalty for breaching confidentiality is also the same, with provisions for a fine of up to one lakh rupees, imprisonment for up to one year, or both.

However, there is a notable difference between the Nepali and Indian laws. The Indian law includes a provision that prohibits the electronic publication of obscene material, whereas this provision is absent in Nepali law. This indicates that at the time of drafting the Electronic Transactions Act, the aspect of freedom of expression may not have been adequately addressed.

Interestingly, the initial draft of the law included a clause specifically mentioning the Computer Association of Nepal (CAN). Article 75 stated that CAN had the authority to develop a Code of Conduct for the Information Technology Industry (Shree Panch ko Sarkar 2057 v.s.[2000]). This inclusion suggests CAN’s involvement in the drafting process. However, it appears that this particular clause was removed from subsequent drafts of the legislation.

The draft of the Electronic Transactions Act, which was submitted to the Council of Ministers around December 2000, was subsequently returned to the Ministry of Law for further revisions. The Ministry of Law took on the responsibility of ensuring that the proposed law aligned with the government’s policies, as well as constitutional, national and international laws and conventions. To accomplish this, representatives from the Ministry of Law, the Ministry of Science and Technology, and the Law Reform Commission collaborated and made the necessary amendments to the draft.<sup>7</sup> Their collective efforts aimed to ensure that the final version of the law met the required legal standards and complied with the relevant regulations.

After approximately a year of deliberation in the Ministry of Law, the draft cyber law was made public on December 22, 2001. The draft was made available for public review and feedback, on the websites of the Ministry of Science and Technology and the National Planning Commission

(Gorkhapatra 2058 v.s. [2001] a). The intention was to pass the bill during the subsequent winter session, and discussions were held in Kathmandu to engage stakeholders and discuss the draft.

During the program held in Kathmandu, the then Minister of Science and Technology, Bhakta Bahadur Balayar, along with Maheshman Shrestha, Secretary of the Ministry, and Uday Nepali Shrestha, Secretary of the Ministry of Law, Justice, and Parliamentary Affairs, expressed their commitment to not only ensure the security and reliability of e-commerce but also incorporate amendments based on the received suggestions (Nepal Samacharpatra 2058 v.s.[2001]). Some of its main provisions were also published in *Gorkhapatra*, a widely circulated newspaper at the time (Gorkhapatra 2058 v.s. [2001]b; Gorkhapatra 2058 v.s. [2002]). The bill aimed to regulate transactions conducted through electronic media, providing a legal framework for conducting secure and reliable e-commerce activities.

Comparing the 2000 draft with the 2001 draft reveals some notable differences. While there were several similarities between the two versions, certain significant clauses were added in the later draft. Firstly, there was a reduction in the severity of sentencing. For instance, the penalty for violating privacy was decreased in the 2001 draft compared to the 2000 draft. The 2000 draft stipulated “a fine of up to one lakh rupees or imprisonment for up to one year or both,” whereas the 2001 draft imposed a fine of ten thousand rupees or imprisonment for one month or both. This change may have been influenced by various factors that were taken into consideration during the drafting process.

Secondly, an important addition to the 2001 draft was Article 63, which introduced a new provision. Article 63 says this in Nepali:

1. Publishing illegal content in electronic form: Any individual who publishes or displays material that is prohibited by the existing laws governing electronic media, including computers and the internet, shall be subject to a fine of up to ten thousand rupees or imprisonment for one month, or both.
2. In case a person repeatedly commits an offense as described in Sub-section (1), each subsequent offense shall be penalized with one and a half times the punishment imposed for the previous offense (Shree Panch ko Sarkar 2058 v.s. [2001]).

It is evident that the severity of the punishment was reduced in the 2001 draft. In the 2000 draft, the punishment for encroaching on people’s privacy was “one lakh fine or up to one-year imprisonment or both”, but it was reduced to “ten thousand fine or up to one-month imprisonment or both”. Perhaps these changes were made as people complained about the severity.

Article 63 also proves that the provision, which restricts freedom of expression unrelated to e-commerce, was included in the draft by the end of 2001. However, despite further efforts, the draft of the Act was submitted to the Council of Ministers in February 2002, but it faced delays and remained pending.

### **The Way of the Ordinance**

After May 22, 2002, the chances of the Electronic Transactions Act becoming law diminished as the political landscape in Nepal took a different turn. On that day, King Gyanendra, upon the recommendation of Prime Minister Sher Bahadur Deuba, dissolved the House of Representatives. Subsequently, on October 4, 2002, the King dissolved the Council of Ministers, citing Prime Minister Sher Bahadur Deuba as “incompetent.” During that time, the Prime Minister informed the King that the scheduled election for the House of Representatives on November 13 could not take place and requested the removal of the obstacle (Shree Panch Ko Sarkar 2059 v.s. [2002]). In this political context, the path for enacting the Electronic Transactions Act shifted, and it could only proceed through an ordinance.

As per the provisions of the Constitution of Nepal 1990, in the event of both Houses of Parliament not functioning, the King had the authority to issue necessary ordinances if deemed necessary. In such cases, the ordinance had to be presented in both Houses of Parliament, and if it was rejected by the House, the ordinance would automatically become inactive. Additionally, the King had the power to repeal the ordinance at any time. Therefore, there was a constitutional provision stating that the ordinance would become automatically deactivated if it was not passed by Parliament or rejected by the King. It was also specified that if the ordinance was not issued or passed within six months of the parliamentary session, it would become ineffective (His Majesty’s Government 1990).

Due to the growing problem of unauthorized computer activities, including hacking into websites and servers, there was an urgent need for the enactment of this law.<sup>8</sup> The absence of a specific law caused difficulties in dealing with such cases. An incident in December 2002 involving the hacking of the Nepal Police website resulted in the arrest of Saroj Joshi, who had to be detained for 15 days due to the lack of appropriate legislation. Additionally, in the first week of December 2002, a group of hackers issued warnings of potential destruction to important websites and Internet service providers. Several individuals, including officials from CAN, Internet service providers, IT professionals, and experts, received email warnings. In response to these threats, CAN formed a committee led by Deepak Rauniyar to safeguard against hacking-related damage. Given the circumstances, experts in the field strongly urged the government to expedite the enactment of a cyber law through an ordinance (Khatri 2059 v.s.[2002]).

According to Purushottam Ghimire, the spokesperson for the Ministry of Science and Technology at that time, the plan was to withdraw the old draft from the Council of Ministers on June 3, 2003 (Gorkhapatra 2060 v.s.[2003]). With the assistance of the Nepal Law Reform Commission, a new draft would be prepared and submitted to the government. The government recognized the importance of this law, as mentioned in the budget presented on July 16, which stated the need for the formulation of a cyber-law to “contain fraud and misuse in internet technology.” (HMG 2003: 16). In July 2003, a 15-day period was provided for public suggestions and feedback. The Ministry of Justice and Parliamentary Affairs suggested to the Nepal Law Reform Commission to seek input from all stakeholders and make necessary reforms in a timely manner. As part of this process, a discussion program was organized in Kathmandu on August 3, 2003, with the aim of gathering suggestions from relevant parties (Kantipur 2060 v.s. [2003]). The proposed bill included provisions for fines ranging from Rs 10,000 to Rs 50,000, as well as imprisonment for a maximum of six months. During the program in Kathmandu, Dr. Prakash Chandra Lohani, the then Finance Minister, expressed concerns regarding the adequacy of the fines. In a report published in the daily newspaper *Spacetime*, he was quoted as saying, “The perpetrators have already caused losses in the tens of millions of rupees, but the fine is only 50,000” (Bhat 2060 v.s. [2003]). Lohani’s argument highlighted the fact that when the punishment is significantly lower than the damage caused by the crime, it may fail to serve as a sufficient deterrent.

While the exact date cannot be determined, it can be estimated that the new draft of the Electronic Transactions Act was submitted to the Council of Ministers around November 2003. A news article published in the *Spacetime*, quoted a source from the law ministry stating that the Act would be presented to the Council of Ministers within the first week of November. The report also mentioned that the Law Reform Commission was given three months to make amendments to the Act (Bhat 2060 v.s.[2003]). According to a news report in the *Annapurna Post* daily on April 20, 2004, the ordinance had been passed by the Council of Ministers and the Bill Committee, but it was still awaiting approval from the King (Dhungel 2060 v.s. [2003]).

However, the process of passing the law in the cabinet was not without difficulties. According to Purushottam Ghimire from the Ministry of Science and Technology, there was a lack of understanding among most of the ministers regarding this issue.<sup>9</sup> As a result, he had to engage in five or six discussions within the ministry to explain the importance of the law. Bhim Dhoj Shrestha, a member of CAN’s working committee from 2002 to 2004, mentioned that CAN representatives were also invited to some of these discussions. During these discussions, the question arose as to why Nepal needed an e-commerce act. The response given was that Nepal should adopt

similar laws as seen in countries like Singapore and India.<sup>10</sup> Subsequently, in April 2004, the ordinance was submitted to King Gyanendra for approval (Kantipur 2061 v.s.[2004]).

In July 2004, the Electronic Transaction Ordinance was issued in accordance with Article 72 of the Constitution of Nepal, 1990. It was officially published in the *Nepal Gazette* on August 14, 2004, marking the legal recognition of e-commerce in Nepal. This ordinance not only introduced penalties for those causing harm to electronically stored information but also addressed the publication of illegal electronic material (Gorkhapatra 2061 v.s.[2003]). The delay of almost three months in stamping the ordinance raises the question of why it took so long. According to a report by Mukul Humagain and Bhojraj Bhat (2061 v.s.[2004]) in *Nepal Magazine*, the implementation of the ordinance was the result of four years of hard work by various entities including the Ministry of Science and Technology, Ministry of Law, Law Reform Commission, High-Level Information Technology Commission, Computer Association of Nepal (CAN), and IT experts and businessmen. The High-Level Information Technology Commission played a significant role in bringing this law to fruition as an ordinance. The commission, established in September 2003 to handle IT related policy work, had the chairman of CAN as an ex-officio member, Sharad Chandra Shah, who had close ties to King Gyanendra at the time, served as the vice-chairman of the commission during the period leading up to the royal rule (Maharjan 2015). It was through his special initiative and support that the implementation of this law as an ordinance became possible. Both the Ministry and CAN had requested the law to be enacted as an ordinance, and CAN actively supported this effort.<sup>11</sup>

Comparing the draft ordinance with the 2001 draft, it is evident that there are notable enhancements in terms of punishment and the scope of criminal activities. One particular provision that sparked controversy is Article 47, which underwent significant changes. Article 47 states the following:

Publication of illegal materials in electronic form:

(1) If any person publishes or displays any material in the electronic media including computer, internet which are prohibited to publish or display by the law in force or which may be contrary to the public morality or decent behavior or any types of materials which may spread hate or jealousy against anyone or which may jeopardize the harmonious relations subsisting among the peoples of various castes, tribes and communities shall be liable to the punishment with the fine not exceeding one hundred thousand Rupees or with the imprisonment not exceeding five years or with both.

(2) If any person commits an offence referred to in subsection (1) time to time he/she shall be liable to the punishment for each time with one-and one-half percent of the punishment of the previous punishment (His Majesty's Government 2005: 29–30).

The Article 63 of the 2001 draft merely stated that “content prohibited by law should not be published or broadcast,” but the ordinance provides a comprehensive explanation to it. Furthermore, the punishment for violating privacy has also been increased. The 2001 draft law stipulated a penalty of “a fine of ten thousand rupees or imprisonment for up to one month or both,” whereas the ordinance now prescribes “a fine of one lakh rupees, imprisonment for two years, or both” for the same offense (Shree Panch Ko Sarkar 2061 v.s. [2005]).

Purushottam Ghimire, the former spokesperson of the Ministry of Science and Technology, argues that the penalties outlined in the draft should be seen as an effort to raise awareness among citizens. He believes that freedom should not be mistaken as a justification for any kind of behavior. During that time, the penalties in Nepal were comparatively higher than those in India and Singapore, reflecting the perception that the potential damage caused by online activities was greater compared to other means.<sup>12</sup> In reality, by 2001, only a small percentage of people in Nepal had access to the internet. According to the World Bank's report in 2001, only 0.24 percent of the population in Nepal had internet access.<sup>13</sup> Consequently, the provision stated in Article 47 seems to have been formulated with consideration for online media. During that period, online media platforms in Nepal often featured reader surveys and discussions, which occasionally involved the use of ‘unrestricted’ language. For instance, a study conducted by Umesh Shrestha on online interactions in online news media in 2001 noted that “the opinions expressed in the discussion forum are those of the users, and Kantipur Online holds no responsibility for the content of the forum, which may include offensive or objectionable views targeting specific segments of society.” (Shrestha 2071 v.s. [2014]: 15) This suggests that abusive language and potentially ‘obscene’ expressions were occasionally used in online interactions.

The ordinance had a validity period of six months. If it is not passed by the parliament within this timeframe, it becomes inactive. However, due to ongoing political instability, especially after the direct rule of the king starting on February 1, 2005, the country saw a surge in the number of ordinances being used to govern. Consequently, the Electronic Transactions Ordinance was reissued multiple times, specifically on March 11, 2005, and September 12, 2006.

### **The ordinance itself became an act**

After the “Second People’s Movement” in 2006, following the proclamation of the House of Representatives, the Electronic Transactions Act was enacted as an official act. The detailed process of introducing and passing bills in the House of Representatives is outlined in the Rules of the House of Representatives, 2063 v.s. According to these rules, members of the House of Representatives were empowered to introduce bills for consideration (Nepal Sarkar 2063 v.s.[2006]).

Due to its initial enactment as an ordinance, there was a sense of urgency to pass this law within the appropriate timeframe. Some individuals within the information technology sector expressed concerns that the new government might undermine the effectiveness of the law, which had been enacted during the royal rule. In response, they held individual and collective meetings with the Minister of Science and Technology to exert pressure for the passage of this law.<sup>14</sup> As a result of these efforts, the Minister of State for Science and Technology, Man Bahadur Bishwakarma, presented the law as a bill in the House of Representatives.

Upon reviewing the proceedings of the meeting during that time, it is evident that there was minimal debate on this issue. On September 4, 2006, Minister Bishwakarma requested permission to introduce the “Electronic Transactions Bill” in the House of Representatives. No objections were raised, and he introduced the bill on the same day. Similarly, during the subsequent theoretical discussion on the bill in the meeting held on September 5, no significant opinions were expressed. On September 10, when the Speaker announced that the bill would be sent to the committee for detailed clause-wise discussion, all agreed. Approximately a month later, during the 85th meeting on November 7, the bill was passed with amendments based on the seven points submitted by the Development Committee.<sup>15</sup> Subsequently, on December 8, 2006, the Electronic Transactions Act, 2006 was implemented. This act became the 27th law passed by the House of Representatives at that time which shows the priority given by the House on this law.

Upon comparing the 2004 ordinance and the 2006 Act, it is evident that there are no significant differences. Article 47 remains unchanged. It appears that the reconstituted House of Representatives, established after the People’s Movement in 2006 passed the law with Article 47 without making any modifications, even retaining the exact wording as it was added during the King’s reign. The section’s definitions of terms such as ‘public morality’, ‘etiquette’, and ‘disturbing the good relations between castes and communities’ are vague and subject to interpretation, varying from person to person (Maharjan 2021). If the House of Representatives had desired, it could have removed or amended the clause to ensure it would not be used



to restrict citizens' freedom of expression.

In 2006, it appeared that nobody cared about the Article 47 of this Act. Individuals and groups in the information technology sector, journalists, and human rights activists did not seem to engage in discussions regarding the implications of this clause at that time. This lack of attention may be attributed to the limited prevalence of internet usage in Nepal during that period. According to the World Bank, only 1.41 percent of the population had internet access in 2007, which increased to 1.97 percent in 2009 and 7.93 percent in 2010. Initially, journalists were unaware of the inclusion of this article in the law. The clause gained more attention only when journalists began to be apprehended by using it.<sup>16</sup> However, it took a few years before this clause started being actively utilized.

With the proliferation of internet access in Nepal, particularly the widespread use of social media, there has been an increase in the misuse of Article 47. The study by Ashankan Malla and Rastra Bimochan Timalsena (2022) shows that the first case invoking this clause was filed in court in 2010 only. According to journalist and human rights activist Taranath Dahal, as criticism and insults proliferated on the internet in Nepal, it appears that the attention of the Nepal Police turned to this section as a means of controlling such behavior.<sup>17</sup> Subsequently, it is evident that cases have been initiated by invoking this clause. However, Dahal noted that despite the police's misuse of the law, the court has dismissed many of these cases. Journalists, intellectuals, artists, and ordinary individuals have been detained by the police based on the use of this article (Maharjan 2021). A study of 100 cybercrime cases shows that they are mostly related to defamation and privacy violation. The study also highlights that these laws have been misused (Ray 2022).

### **Conclusion**

The process of formulating the electronic transactions law between 2000 and 2006 appears to have been inclusive, involving government employees, information technology experts, businessmen, and the general public at various stages. However, despite such participation, it remains unclear how public opinion was integrated into the draft law. During the enactment of this law, the Internet was still new in Nepal, and public access to it was limited. Moreover, given that the law primarily focused on e-commerce (Maharjan 2014), it can be inferred that the interest of the general public and the journalism community waned. The provision regarding freedom of expression within the e-commerce law went unnoticed by journalists around 2006 and did not become a topic of debate.

Upon examining the process of lawmaking for electronic transactions, it is evident that various organizations and individuals in the field of

information technology actively participated. Initially, the sector itself proposed the draft law and subsequently, provided suggestions and put pressure to address emerging issues. The involvement of information technology traders and experts, including CAN, played a crucial role in enacting this law as an ordinance during the volatile political situation, and later as an act after the establishment of the House of Representatives. The awareness of provisions prohibiting the dissemination of 'illegal' content on the Internet was primarily observed among the community, lawyers, and members of the House of Representatives. However, they did not engage in substantial debate regarding this article in 2006. It should be noted that the original draft submitted by CAN in 2000 did not include such a clause. The Ministry of Law, Nepal Law Reform Commission, Ministry of Science and Technology, and the High-Level Information Technology Commission recognized the need for such a provision, which was ultimately approved by the House of Representatives. This study highlights the significant role of the information technology sector, which facilitated the successful implementation of this law in Nepal.

Critics, including journalists and human rights activists, have raised concerns about Article 47 of the Act, and it is indeed possible to make necessary amendments to address these concerns. The reform process could involve amending or removing this section to ensure that it does not infringe upon freedom of expression unrelated to e-commerce. Additionally, measures can be implemented to mitigate the misuse of this clause. For instance, individuals who abuse the clause could face appropriate punishment and victims of misconduct could be provided with compensation. However, over the past 17 years, neither the parliament nor the government has taken any concrete steps to reform the law and reduce the misuse of this article. Furthermore, a new bill introduced to replace the Electronic Transactions Act is currently under consideration in the parliament due to the controversy surrounding it. The failure to make necessary amendments has resulted in the continued misuse of this clause, often for personal gain and vendetta based on political affiliation.

## FOOTNOTES

<sup>1</sup> This paper is a full and revised version of the research brief published in 2022 in Nepali (Maharjan 2078 v.s. [2022]b ).

<sup>2</sup> The details of this procedure is available here: <https://hr.parliament.gov.np/en/bills/Za1OEE23>

<sup>3</sup> Kasajoo donated this collection to Martin Chautari Library for public use.

<sup>4</sup> More information on the news and other materials published related on the internet and digital rights are available in the bibliographies I co-compiled (Maharjan et al; 2015; Maharjan and Moktan 2023).

<sup>5</sup> Email interview with Durga Bhurtel on November 15, 2021.

<sup>6</sup> Interview with Rajib Subba on December 3, 2021.

<sup>7</sup> Interview with Udaya Nepali Shrestha, then secretary of the Ministry of Law on December 16, 2021.

<sup>8</sup> Interview with advocate Satish Krishna Kharel on September 17, 2021.

<sup>9</sup> Interview with Purrushottam Ghimire, then spokesperson of the Ministry of Science and Technology on September 2, 2021.

<sup>10</sup> Interview with Bhim Dhoj Shrestha on December 5, 2021.

<sup>11</sup> Interview with Purrushottam Ghimire, then spokesperson of the Ministry of Science and Technology on September 2, 2021.

<sup>12</sup> Interview with Purrushottam Ghimire, then spokesperson of the Ministry of Science and Technology on September 2, 2021.

<sup>13</sup> Information available at <https://data.worldbank.org/indicator/IT.NET.USER.ZS?locations=NP>.

<sup>14</sup> Interview with Bhim Dhoj Shrestha on December 5, 2021.

<sup>15</sup> I tried to get to find these points in the Development Committee, but I did not succeed.

<sup>16</sup> Interview with Taranath Dahal on December 9, 2021.

<sup>17</sup> Interview with Taranath Dahal on December 9, 2021.

## REFERENCES

Abhilash, C. M. 2002. E-commerce Law in Developing Countries: An Indian Perspective. *Information & Communication Technology Law* 11(3): 269–281.

Basu, Subhajit and Richard Jones. 2003. E-commerce and the Law: A Review of India's Information Technology Act, 2000. *Contemporary South Asia* 12 (1): 7–24.

Bhat, Bhojraj. 2060 v.s.[2003]. Prastabit 'Cyber Law' Masaudamathi Chhalphal. *Spacetime*, August 4, p. 2.

Bhattarai, Manohar K. 2001. Electronic Commerce. In *Information Technology for Development: IT Policy and Strategy Papers for Nepal*. Greeta M. Rana, Kesang T. Lama and Manohar Bhattarai, eds., pp. 135-154. Kathmandu: National Planning Commission.

Blythe, Stephen. 2008. On Top of the World and Wired: A Critique of Nepal's E-commerce Law. *Journal of High Technology Law* 8(1). Available at [https://sites.suffolk.edu/jhtl/files/2018/02/Blythe\\_Article-2jrlnfc.pdf](https://sites.suffolk.edu/jhtl/files/2018/02/Blythe_Article-2jrlnfc.pdf).

Dhungel, Mohan. 2060 v.s. [2003]. Bidutiya Karobar Sambandhi Ain Chandai Aaune. *Spacetime*, November 15, p. 9.

Gorkhapatra. 2058 v.s. [2001]a. Electronic Karobarsambandhi Bideyakko Tayari Antim Charanma. December 23, p.1.

Gorkhapatra. 2058 v.s. [2001]b. Computer Aparadh Rokna Ain Bandaichha. December 28, p. 2.

Gorkhapatra. 2058 v.s. [2002]. Computer Aparadh Rokna Ain Bandaichha. January 4, p. 2.

Gorkhapatra. 2060 v.s. [2003]. Bidutiya Karobar Ain Lyaune Tayari. July 31, p.12.

Gorkhapatra. 2061 v.s. [2004]. Bidutiya Karobarlai Kanoni Manyata. September 19, p. 2.

Government of India. 2000. The Information Technology Act, 2000, *The Gazette of India*. Part II. Section 1, June 9.

His Majesty's Government. 1990. *Constitution of Kingdom of Nepal*. Kathmandu: Ministry of Law, Justice and Parliamentary Affairs.

His Majesty's Government. 2000. *Proceedings of a National Stakeholders Workshop on Strategy Papers Prepared for Nepal on Information Technology for Development (August 24, 2000)*. Kathmandu: National Planning Commission Secretariat.

His Majesty's Government. 2003. Budget Speech 2003/04. Available at:

[https://www.mof.gov.np/uploads/document/file/Budget%20Speech%202003\\_20201118043117.pdf](https://www.mof.gov.np/uploads/document/file/Budget%20Speech%202003_20201118043117.pdf); accessed July 28, 2023.

His Majesty's Government. 2005. An Ordinance to provide the provisions for Electronic Transactions. Unofficial English Translation report.

- Humagain, Mukul and Bhojraj Bhat. 2061 v.s. [2004]. Aayo Cyber Kanoon. *Nepal*, September 30: 34–35.
- Kantipur. 2060 v.s. [2003]. Bidutiya Karobar Bidhayek Saralakaran Garna Sujhab. August 4, p. 9.
- Kantipur. 2061 v.s. [2004]. Cyber Kanoon ra Chetana Abhable Suchana Parbidhima Suraksya Samarya. May 3, p.9.
- Khatri, Bijaybabu. 2059 v.s. [2002]. Adhyadeshdwara Cyber Kanoon Lyauna Mag: Hacker Samuhadwara Website ra Internet Sewa Dhwesta Parne Chetawani. *Kantipur*, December 24, p. 10.
- Mahanayadhibaktako Karyalaya. 2074 v.s. [2017]. *Bidutiya Karobar Ain, 2063 Sambandhi Kasoorko Awastha Adhyayan Samuhadwara Prastut Antim Pratibedan*. Kathmandu: Mahanayadhibaktako Karyalaya.
- Maharjan, Harsha Man. 2014. *Universal Connectivity in Nepal: A Policy Review*. Kathmandu: Martin Chautari.
- Maharjan, Harsha Man. 2015. Rise and fall of High Level Information Technology Commission in Nepal. A paper presented at the Fourth Annual Kathmandu Conference on Nepal and the Himalaya, July 22-24, Kathmandu.
- Maharjan, Harsha Man. 2021. *Freedom of Expression in Nepal in the Digital World: A Policy Review*. Kathmandu: Martin Chautari.
- Maharjan, Harsha Man. 2078v.s. [2022]a. Dafa 47 Ko Khatra. *Himal* 30 (6), 82-83.
- Maharjan, Harsha Man. 2078 v.s. [2022]b. *Bidyutiya Karobar Ain, 2063 Nirmanko Pristhabhumi ra Prakriya*. Kathmandu: Martin Chautari.
- Maharjan, Harsha Man, Ramita Maharjan, Arjun Panthi, Shailesh Pandey and Prakriti KC. 2015. Writings on the Internet in Nepal: A Bibliography. Kathmandu: Martin Chautari. Available at <http://martinchautari.org.np/storage/files/writings-on-the-internet-in-nepal-a-bibliography.pdf>; ; accessed July 25, 2023.
- Maharjan, Harsha Man and Sanjila Moktan. 2023. Digital Rights in Nepal: A Preliminary Bibliography. Kathmandu: Martin Chautari. Available at [www.martinchautari.org.np/files/bibliography/Digital-Rights-in-Nepal\\_A-Preliminary-Bibliography\\_CBS2023-1.pdf](http://www.martinchautari.org.np/files/bibliography/Digital-Rights-in-Nepal_A-Preliminary-Bibliography_CBS2023-1.pdf); accessed July 25, 2023.
- Malla, Ashankan and Rastra Bimochan Timalsena. 2022. *A Study on Cyber Crime Cases in Nepal: Challenges and Recommendations*. Kathmandu: National Judicial Academy.

Nepal Kanon Aayog. 2066 v.s. [2009]. *Kanoon Tarjuma Digdarshan*. Kathmandu: Nepal Kanon Aayog.

United Nations Commission on International Trade Law. 1999. UNCITRAL Model Law on Electronic Commerce with Guide to Enactment 1996. Available at [https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/19-04970\\_ebook.pdf](https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/19-04970_ebook.pdf); accessed November 30, 2021.

Nepal Samacharpatra. 2057 v.s. [2000]. Computer Apradhilai Nepalma Pani Danda Sajayen. December 21, p. 1.

Nepal Samacharpatra. 2058 v.s. [2001]. Computerbata Hune Aparadh Niyantaran Garna Kanunko Tayari. December 22, p. 2.

Nepal Sarkar. 2063 v.s. [2006]. Partinidhi Sabha Niyemawali, 2062 v.s. *Nepal Rajpatra*, Khandra 56, Atiriktanka 18, June 10.

Rastriya Samachar Samiti. 2076 v.s. [2019]. Bidutiya Karobar Ainka Dui Dafa Kharej Garna Patrakar Mahasanghko Mag. Online Khabar, April 18. Available at <https://www.onlinekhabar.com/2019/04/759053>; accessed July 28, 2023.

Ratopati. 2074 v.s. [2018]. Bidutiya Karobar Ain Pariwastan Garna Nepal Prahariko Maag. February 21. Available at <https://www.ratopati.com/story/34310/2018/2/21/news>; accessed March 12, 2024.

Raut, Balram Prasad. 2018. Analysis of Law Relating to Cybercrime in Nepal. In *Contemporary Issues in International Law: Environment, International Trade, Information Technology and Legal Education*. B.C. Nirmal and Rajnish Kumar Singh, eds., pp. 401–412. New Delhi: Satyam Law International.

Ray, Suraj. 2022. *Inappropriate Approach to Cybercrime: A Critical Review on Investigation, Prosecution and Adjudication of 100 Cybercrime Cases in Nepal*. Kathmandu: Freedom Forum.

Sedai, Ram Sharan. 2057 v.s. [2000]. Suchana Prabidhi Sambadhi Masauda Ain Tayar. *Kantipur*, December 4, p. 11.

Shree Panch ko Sarkar. 2057 v.s. [2000]. Bidutiya (Electronic) Karobar ra Bidutiya Hastaksyarsambandhi Bewastha Garna Baneko Bidayak. Unpublished draft.

Shree Panch Ko Sarkar. 2058 v.s. [2001]. Bidutiya Sanchar Madhyambata Hune Karobarlai Niyamit Garne Bewastha Garna Baneko Bidhek. Unpublished draft.

Shree Panch Ko Sarkar. 2059 v.s. [2002]. Shahi Sandesh. *Nepal Gazette*, Volume 52, Additional Issue 49, October 4.

Shree Panch Ko Sarkar. 2061.v.s. [2004]. Bidutiya Karobar Sambandhama Bewastha Garna Baneko Adhyadesh. *Nepal Gazette* Volume 54, Additional Issue 24, September 15.

Shrestha, Umesh. 2071 v.s. [2014]. Online Patrakaritama Antarkriya: Nepalka Char Online Patrikaharuma Chhapiyeka Pratikriyaharuko Gunastar ra Aayam Bisayek Adhyayan. MA thesis, TU.

Wagle, Dinesh. 2058 v.s. [2001]. Nepal IT-Santaunama Safal. *Nepal*, April 14-28, p. 35-38.

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